No. _____ (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF WEST VIRGINIA, ex rel., CSR LIMITED,
Petitioner,

—v.—

THE HONORABLE A. ANDREW MACQUEEN, III, Judge of the Circuit Court of Kanawha County, CLIFFORD BOSTIC, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

CHARLES FRIED
Counsel of Record
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

Paul M. Friedberg
Webster J. Arceneaux, III
Richard L. Gottlieb
LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS
Suite 700–One Valley Square
P.O. Box 1746
Charleston, West Virginia 25326
(304) 345-2000

Jonathan I. Blackman
Howard Zelbo
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for Petitioner
CRS Limited

4 pp

QUESTIONS PRESENTED

CSR, an Australian mining corporation, sold raw asbestos fiber F.O.B. Australia to Manville, which processed the fibers and used them as ingredients in certain types of building materials that Manville allegedly sold throughout the United States.

1. May an alien corporation that sells a raw material outside of the forum State be sued in that State on the basis that it "could not conceivably have been unaware" that the finished product manufactured outside of the forum State by a United States purchaser "was being widely distributed throughout all of the United States . . . ", without any showing that the defendant engaged in any purposive activity directed toward the forum State?

2. Would the exercise of personal jurisdiction in such a case comport with fair play and substantial justice?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, approximately 11,000 individual plaintiffs whose complaints were consolidated for trial were parties to the proceedings in the court below. The names of these individuals are set forth in a separate list that has been lodged with the Clerk of the Court.

Petitioner CSR Limited has no parent corporation. Its subsidiaries, other than wholly-owned subsidiaries, are as follows:

Bradford Rockwool (M) Sdn Bhd
CSR Hebel Australia Pty. Limited
Gove Aluminium Ltd.
Gove Aluminium Finance Ltd.
Monier Brickmakers Limited
Monier Colourtile Pty. Ltd.
Monier Management Pty. Ltd.
Monier PGH Limited
Monier Roofing Limited
Olympic Roofing Pty. Limited
PGH Limited
Reliance Roof Tiles Pty. Ltd.
Rivarol Pty. Limited
Wunderlich Roof Tiles Pty. Limited
Zacuba Pty. Limited

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PETITION FOR A WRIT OF CERTIORARI

CSR, Limited ("CSR"), respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 441 S.E.2d 658 (W. Va. 1994). It is reproduced at App. A *infra*, 1a. The Supreme Court of West Virginia denied a petition for rehearing without opinion. The

ruling and oral opinion of the Circuit Court of Kanawha County is unreported. An authenticated transcript appears at App. B, at 13a; App. C at 16a, *infra*.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered its judgment denying CSR's petition for a writ of prohibition on February 17, 1994, and denied CSR's petition for rehearing on March 23, 1994, whereupon the judgment of the Supreme Court of Appeals of West Virginia became final. *Department of Banking v. Pink*, 317 U.S. 264 (1942). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). *Asahi Metal Industry Co., Ltd. v. Superior Court of Ca.*, 480 U.S. 102 (1987) (certiorari from denial of motion to quash summons); *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984) (same); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (certiorari from denial of writ of prohibition).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the due process clause, section one of the fourteenth amendment:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case presents the Court with an opportunity to decide between the plurality opinion of Justice O'Connor in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum

State . . . ," *id.* at 112, and the concurring opinion of Justice Brennan that "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit." *Id.* at 117. Even if the broader view of jurisdiction is taken, this case presents the further question whether that view, particularly as applied to an alien seller of a raw material, comports with the " 'fair play and substantial justice,' " *id.* at 116 (citation omitted), that the Court found lacking in *Asahi*.

Petitioner CSR is an Australian corporation with its principal place of business in Sydney, Australia. Between 1948 and 1966, the relevant time period in this case, CSR was a sales agent for a subsidiary that mined raw asbestos fibers in Australia. The asbestos fiber consigned for sale in Australia by CSR was generally sold F.O.B. Australia to Johns Manville Corporation ("Manville"), at the time the largest manufacturer of asbestos-containing products in the United States. Manville typically took delivery of the asbestos fiber F.O.B. in Australia and caused it to be delivered to various Manville plants in the United States, none of which were located in West Virginia. Manville also had its own asbestos mines and purchased asbestos fiber from other mines throughout the world. It received only a small portion of its total usage of asbestos fiber from CSR.[1]

Plaintiffs claim that Manville used CSR fiber to make two types of products, sheets 83 and 84 packing and asbestos cement (transite) pipe, although, as is true of many asbestos-containing products, it is impossible to determine by inspection or analysis the origin of the raw fiber in the finished product. Plaintiffs assert that Manville from its several plants

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[1] CSR represented to the Circuit Court that CSR's fiber constituted less than 1% of the fiber used by Manville from 1948 to 1966. This representation is uncontroverted.

distributed these products throughout the United States,[2] as it did many other finished asbestos products.

Respondents are approximately 11,000 individuals who originally brought suit in 1992 and 1993 in the Circuit Court of Kanawha County, West Virginia against 125 defendants, claiming personal injury from exposure to numerous asbestos products. As regards CSR, an unspecified number of the plaintiffs claimed exposure to Manville 83 and 84 sheet packing and transite pipe allegedly containing CSR fiber. These complaints were consolidated for trial by Chief Justice A. Andrew MacQueen of that court. *In re: Asbestos Cases III*, Civil Action No. 92-C-8888.[3]

A. The Proceedings Before The Circuit Court

On April 28, 1993, CSR filed with the Circuit Court a motion to dismiss the complaints against it for lack of personal jurisdiction. CSR offered affidavits and answered respondents' interrogatories to support its contention that there was a complete absence of contacts between CSR and West Virginia. Respondents' evidence in opposition consisted of affidavits in which four out of the 11,000 plaintiffs claimed exposure at some time to "83 and/or 84" sheet packing and transite pipe, and various documents from another consolidated asbestos case involving a shipyard in Mississippi purportedly showing that Manville may have used CSR fiber to make these products at one time or another. No evidence was offered to show the volume or value of these products sold by Manville in West Virginia, or the amount or value of any CSR

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[2] Respondents offered no evidence below of the volumes of Manville's sales of these products in West Virginia or the United States as a whole, and also offered no evidence that any of the products that Manville may have sold in West Virginia in fact contained CSR fiber, as opposed to fiber from one of Manville's many other sources.

[3] Other than the fact that they involve West Virginia plaintiffs and some type of asbestos product, these 11,000 claims have no common connection with one another.

fiber used by Manville to make any such products sold in West Virginia.

On November 16, 1993, after reviewing the materials submitted to him and hearing legal argument, Chief Judge MacQueen of the Circuit Court entered a bench ruling, denying CSR's motion. Judge MacQueen stated that, although "[i]nitially, it appeared to me to be about as clear as anything could that we couldn't have any jurisdiction over CSR," App. B at 14a, a study of the law indicated to him that the Supreme Court of the United States has "clearly adopted the stream of commerce rule. . . . My understanding is that the stream of commerce notion is that if a manufacturer puts his product in the stream of commerce, that he can be held accountable wherever he is found, that is, that he will not be heard to object that he didn't expect his product to appear in whatever forum or jurisdiction it appeared in." *Id.* at 15a.

Judge MacQueen acknowledged that he was "not at all sure that the decisions of the United States Supreme Court answer the questions that I have in front of me." App. B at 14a. But he concluded that he was bound to accept what "the expression of Justice Brennan and his three colleagues indicate[ ]", because "the only really probative thing I could find was the fact that the United States Supreme Court refused to accept jurisdiction in our *Showa-Danko* [sic] case [*Hill by Hill v. Showa Denko, K.K.*, 188 W. Va. 654, 425 S.E.2d 609 (1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2338 (1993)]. After reviewing this *Showa-Danko* [sic] case, I have concluded . . . that the [Supreme] Court [of the United States] has clearly adopted the stream of commerce rule." *Id.*

B. The Decision Of The Supreme Court Of Appeals Of West Virginia

On November 17, 1993, CSR filed a petition for a writ of prohibition in the West Virginia Supreme Court of Appeals challenging Judge MacQueen's decision that the courts of

West Virginia had personal jurisdiction over CSR. On February 17, 1994, the state Supreme Court issued its opinion denying the writ of prohibition. The court's syllabus[4] stated that "personal jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause and can be exercised without the need to show additional conduct by the defendant aimed at the forum state" (internal quotation marks omitted), relying on Justice Brennan's concurring opinion in *Asahi*, App. A at 2a. The syllabus further indicates that West Virginia will "always" assert jurisdiction to the furthest extent permitted by the "stream of commerce theory articulated in [the *Asahi* case]." *Id.*

The West Virginia court noted plaintiffs' assertion that CSR's activities and interest in the sale of its raw material to Manville were such that it "could not have been unaware that its asbestos was being used in products widely distributed by Johns Manville throughout all of the United States including, obviously, West Virginia." App. A at 4a. On this basis it concluded that it was "satisfied that CSR introduced a product into the stream of American commerce that it knew would be used in West Virginia,"[5] *id.*, and that this was sufficient for the assertion of personal jurisdiction " 'without the need to show additional conduct by the defendant aimed at the forum state.' " *Id.* at 5a (quoting Justice Brennan's concurrence in the *Asahi* case).

The court went on to observe that since jurisdiction had been asserted over CSR in an unrelated case in the state of

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[4] In West Virginia, the Supreme Court of Appeals is required to prepare a syllabus "of the points adjudicated in each case", W. Va. Const. art. VIII, § 4, and the syllabus with the attached opinion constitutes the court's holding, *see Summers County Citizens League, Inc. v. Tassos*, 179 W. Va. 261, 266, 367 S.E.2d 209, 214 (1988).

[5] Judge MacQueen had found that CSR had no idea where West Virginia was at the time it was selling raw asbestos fiber to Manville and made no finding that CSR knew that a product containing its fiber would be used there. App. C at 17a.

Mississippi, and might be asserted in other states too, a failure by the West Virginia courts to assert jurisdiction over CSR "will ravish whatever insurance fund CSR has available to pay injured plaintiffs at the expense of West Virginia plaintiffs." App. A at 5a. For this reason, the court determined that it was appropriate to assert jurisdiction "congruent with the outer edge of the due process envelope . . . as determined by the Supreme Court of the United States," *id.*, a limit the court equated with Justice Brennan's version of the stream of commerce theory.

The West Virginia court stated, in the penultimate sentence of its summary of the circumstances leading to its jurisdictional conclusion, that "CSR was actively engaged in the development and introduction of products that contained their raw materials." App. A at 6a. In the context of the court's evident intention to invoke the most expansive reading of the stream of commerce theory, the court's own authoritative syllabus, and the trial court's determination, this observation cannot be taken as anything more than a rather argumentative summary of the factors the court had listed immediately before: CSR's introduction of its asbestos fibers into the stream of American commerce, its assumed awareness that they would be incorporated in products distributed throughout the United States, and its ongoing commercial relation with Manville. (Indeed, earlier in its opinion, the court characterized this statement as simply one of plaintiffs' assertions. App. A at 4a.) There is no record evidence to support a conclusion that CSR engaged in any activities other than those attendant upon its sales of raw fiber to Manville, and certainly the Circuit Court, which was the only tribunal to hold an evidentiary hearing on this matter, reached no such conclusion.

On the contrary, Judge MacQueen specifically treated the question of any West Virginia-oriented conduct by CSR as irrelevant to his holding that CSR could not be heard to object that it "didn't expect [its] product to appear in whatever forum or jurisdiction it appeared in," App. B at 15a, and made

no findings regarding any role by CSR (for there was none) in Manville's own product development or sales. The concurring opinion of Justice Miller of the West Virginia Supreme Court underscores the sweeping, non-particularized nature of the West Virginia Supreme Court's stream of commerce holding, noting both that the trial court had "made no findings of fact", App. A at 7a, and that the majority's substantive holding was "not supported by the facts." *Id.* at 9a. The West Virginia court neither contradicted nor sought to meet Justice Miller's concerns, and therefore must be taken to have rested its holding on its broad view of the "outer . . . envelope" of the stream of commerce concept, which made unnecessary additional facts supposed to show some purposive conduct by CSR directed toward the West Virginia forum.[6]

CSR petitioned the Supreme Court of Appeals for rehearing. The petition for rehearing was denied, but the court did grant CSR a stay until June 23, 1994, to permit CSR to file this petition.

REASONS FOR GRANTING THE WRIT

1. The differing standards for personal jurisdiction stated in Justice O'Connor's plurality opinion and Justice Brennan's concurrence in the *Asahi* case have engendered numerous conflicts in the federal courts of appeals and in state courts of last resort over the last seven years. Such conflicts, traceable to a disagreement in this Court, are a source of continuing uncertainty and litigation that can only be resolved by this

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[6] If this Court were ultimately to agree with CSR's contention that the introduction of goods into the stream of commerce coupled with a hypothetical awareness that the goods may find their way into the forum State is an insufficient basis for personal jurisdiction, and yet be troubled by any ambiguity regarding the basis of the West Virginia court's decision, an appropriate disposition is available. Rather than reversing outright, this Court should then remand to the Supreme Court of Appeals to dispose of this case on the correct legal standard.

Court. The need for a resolution by the Court is particularly urgent where, as in this case, non-United States parties are involved and international trading partners are subject to unpredictable assertions of jurisdiction based on uncertain standards.

2. The court below disregarded the "fair play and substantial justice" branch of the standard for assertion of personal jurisdiction over foreign defendants, which all Justices in *Asahi* except Justice Scalia agreed defeated jurisdiction there. *Asahi*, 480 U.S. at 102 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).[7] While the Court in *Asahi* considered the "fair play and substantial justice" requirement for the constitutional assertion of personal jurisdiction as having a content substantively different from "minimum contacts", (whether defined in terms of stream of commerce or otherwise), *Asahi*, 480 U.S. at 114, the West Virginia court ignored this requirement, and treated placement of a product in the stream of commerce as automatically creating *in personam* jurisdiction wherever the stream may flow. For an alien seller of raw materials or component parts, which has no control and typically no knowledge of the use or distribution of the final product in which its materials or parts are incorporated, this neglect of the "fair play and substantial justice" component of the due process analysis produces particularly burdensome and unfair results when coupled, as it was in this case, with the broadest possible reading of the stream of commerce doctrine. This Court should grant certiorari to clarify the contours of "fair play and substantial justice" in this context, and affirm its vitality as a meaningful part of the constitutional law of personal jurisdiction.

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[7] Justice Scalia agreed that jurisdiction did not exist, but joined only in the plurality opinion that "something more" than the defendant's awareness of its product's entry into the forum State through the stream of commerce is constitutionally required. *Asahi*, 480 U.S. at 111.

I. THE DECISION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF NUMEROUS FEDERAL COURTS OF APPEAL AND STATE COURTS OF LAST RESORT

Since *Asahi* was decided in 1987, the conflicting views of the plurality and concurring opinions in that case have spawned a host of conflicting decisions in the federal courts of appeals and state courts of last resort. The plurality opinion of Justice O'Connor (or pre-*Asahi* versions of that approach) have been followed by decisions in three circuits holding that placement of a product into the stream of commerce and awareness that it may end up in the forum state do not suffice to support jurisdiction: *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 681-83 (1st Cir. 1992); *Federal Insurance Co. v. Lake Shore, Inc.*, 886 F.2d 654, 658-59 (4th Cir. 1989); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 376 (8th Cir. 1990); *but see Barone v. Rich Bros.*, No. 93-1833, 1994 WL 201748 at *5 (8th Cir. May 24, 1994) (distinguishing *Falkirk* where defendant "poured its product into regional distributors throughout the country"). A pure stream of commerce analysis, on the other hand, has been followed in three circuits: *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415 (5th Cir. 1993) (rejecting *Asahi* plurality opinion); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385-86 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992); *Hedrick v. Daiko Shoji Co., Ltd.*, 715 F.2d 1355, 1358 (9th Cir. 1983).

Other circuits have avoided squarely addressing the question. *See Tobin v. Astra Pharmaceutical Prods., Inc.*, 993 F.2d 528, 543 (6th Cir.) (upholding jurisdiction "[e]ven under the test set forth in the plurality opinion in *Asahi*"), *cert. denied*, ___ U.S. ___, 114 S. Ct. 304 (1993); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993) (noting that "the current state of the law regarding personal jurisdiction is unsettled"); *but see Bond v. Octagon Process, Inc.*, 926 F.2d

1573 (11th Cir.), *aff'g*, 745 F. Supp. 710, 714 (M.D. Ga. 1990) (rejecting pure stream of commerce approach), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2855 (1991).

This divergence of views—both before and after *Asahi*—is present in the state courts of last resort as well. *Compare Volkswagenwerk, A.G. v. Klippan, GmbH*, 611 P.2d 498, 500-02 (Alaska) (accepting the stream-of-commerce theory), *cert. denied*, 449 U.S. 974 (1980); *Ford Motor Co. v. Atwood Vacuum Mach. Co.*, 392 So. 2d 1305, 1311-13 (Fla.) (accepting the theory), *cert. denied*, 452 U.S. 901 (1981); *Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 477-81, 508 A.2d 1127, 1136-37 (1986) (accepting the theory); and *Hedges v. Western Auto Supply Co.*, 640 A.2d 536, 537 (Vt.) (jurisdiction where United States manufacturer sold its products to a well-known national distributorship), *cert. denied*, ___ U.S. ___, 62 U.S.L.W. 3787 (1994) *with Whitbeck v. Bill Cody's Ranch Inn*, 428 Mich. 659, 678-83, 411 N.W.2d 439, 448-50 (1987) (rejecting the theory); and *Parry v. Ernst Home Ctr. Corp.*, 779 P.2d 659, 666-67 (Utah 1989) (rejecting the theory).

This sharp and recurring conflict over the proper approach to determining personal jurisdiction over foreign manufacturers—a staple issue of civil litigation in the lower state and federal courts—warrants this Court's review. The instant case furnishes an appropriate vehicle for resolving this conflict, because the West Virginia court's "outer edge of the due process envelope" theory is avowedly not based on any analysis of the "quality and nature" of CSR's contacts with West Virginia, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), but rests on CSR's placement of its fiber—by its sales to Manville—into the stream of commerce in the United States as a whole. This case therefore poses in the starkest terms the question of the extent to which state boundaries and the requirement of forum-directed activity by the defendant mandated by *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985), *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297

(1980), and *Hanson*, 357 U.S. at 250-53, continue to be meaningful to the exercise of state court jurisdiction over foreign manufacturers on state-created causes of action.

There is an especial need for resolution of the proper jurisdictional standard by this Court for the large class of foreign sellers of industrial raw materials like CSR and the cognate class of foreign component parts manufacturers that was the subject of *Asahi*. To the extent that state courts are expanding substantive state tort law to impose liability on such sellers for finished products made with their materials, the question whether sales to a United States manufacturer create jurisdiction wherever that manufacturer chooses to distribute *its* products must be resolved so that foreign raw material sellers can meaningfully predict and attempt to insure for their possible exposure. Whether the view of the stream of commerce theory followed in the context of the distribution of finished products like automobiles from a defendant manufacturer to ultimate consumer, *see e.g.*, *Barone*, 1994 WL 201748 at *5; *Hedges*, 640 A.2d at 537, should be applied to support jurisdiction over a foreign raw materials seller based exclusively on the conduct of the manufacturer who uses the defendant's materials to make its own product is a question of great importance, and the lower courts' disarray over the proper scope of the stream of commerce doctrine creates especially burdensome uncertainty in that context.

II. THE DECISION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT REQUIRING THAT THE ASSERTION OF PERSONAL JURISDICTION OVER A DEFENDANT, PARTICULARLY A NON-UNITED STATES DEFENDANT, COMPORT WITH FAIR PLAY AND SUBSTANTIAL JUSTICE

Eight members of the Court in *Asahi* agreed that, besides establishing some purposeful contact between the defendant and the forum state (whether analyzed in terms of placement

of a product in the stream of commerce or some other standard), the invocation of personal jurisdiction by a state court must also be reasonable and comport with traditional notions of "fair play and substantial justice." 480 U.S. at 116.[8] The Court stressed the particular need to pay heed to these concerns in the case of an alien (non-United States) defendant, holding that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 114. In requiring a separate analysis of whether the exercise of jurisdiction would be "unreasonable and unfair", *id.* at 116, even if minimum contacts between the defendant and the forum state exist, the Court emphasized that when the defendant is an alien, international interests come into play, such that " '[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field,' " *id.* at 115 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J. dissenting)).

The West Virginia court ignored this separate analysis of "fair play and substantial justice" required by *Asahi* and its jurisdictional progenitors going back to *International Shoe*, and treated its own broad reading of the stream of commerce doctrine as conclusive on the issue of jurisdiction over CSR as an alien supplier of raw materials to a United States customer outside West Virginia. While expressing itself as "not unsympathetic to CSR's plight", the West Virginia court did not analyze the reasonableness or fairness of its exercising jurisdiction over CSR, noting only that if it did not exercise

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[8] Justice Stevens' concurring opinion in *Asahi* did not consider it necessary to decide the stream of commerce issue, but indicated that "the volume, the value and the hazardous character" of the components would be relevant to any determination of whether the component manufacturer's conduct there rose to the level of "purposeful[ ] avail[ment]" of the privilege of conducting business in the forum state within the meaning of *Hanson*, 357 U.S. at 253. *Asahi*, 480 U.S. at 122.

jurisdiction and other states did, CSR's "insurance fund" would be "ravish[ed]" to pay non-West Virginia plaintiffs at the expense of West Virginians. The court thus turned on its head *Asahi*'s sensitivity to the burdens imposed on non-United States defendants and the international system by overly aggressive assertions of state court jurisdiction, and in effect held that as long as an alien defendant is subject to jurisdiction in any one of the fifty states, it should be required to submit to jurisdiction in all of them.[9]

The West Virginia court's approach to the issue of jurisdiction therefore conflicts both with *Asahi* and with this Court's teaching in *World-Wide Volkswagen* that it has "never accepted the proposition that state lines are irrelevant for jurisdictional purposes." 444 U.S. at 293. The West Virginia court's "outer . . . envelope" version of the stream of commerce doctrine, unmitigated by any serious consideration of the "fair play and substantial justice" component of due process in the jurisdictional setting, results in a situation where state court jurisdiction can be asserted without any showing that the defendant " 'purposefully directed its activities towards residents of the forum.' " *Burger King*, 471 U.S. at 472 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).) Instead of treating the stream of commerce concept (whatever its contours) as a framework for analyzing whether the defendant has purposefully established a connection between itself and the forum state, as *World-Wide Volkswagen* and the various opinions in *Asahi* do, the West Virginia approach makes it into a talisman that mechanically creates jurisdiction whenever a defendant anywhere in the world sells raw materials or components to a United States

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[9] In effect, the West Virginia court by judicial fiat did what this Court in *Asahi* questioned Congress' power to do for federal courts on state-created causes of action: "authorize . . . personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the . . . court sits." 480 U.S. at 113 n.* (emphasis in original).

purchaser, and wherever products made by such a purchaser with these materials or components may end up.

A decision by this Court to resolve the existing controversy over the stream of commerce doctrine by adopting the plurality opinion in *Asahi* would go far towards remedying the unfairness of this outcome for CSR and similarly situated non-United States raw materials and component parts sellers. A requirement that a foreign defendant be shown to have engaged in additional conduct directed toward the forum state beyond the placement of a product into the stream of commerce would, in most if not all cases, make it fair and reasonable to subject the defendant to suit there. Regardless of how that issue is resolved, however, certiorari should be granted here because of the clear conflict between the West Virginia court's "outer . . . envelope" approach to the stream of commerce doctrine and the "fair play and substantial justice" aspect of *Asahi*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: June 20, 1994

Respectfully submitted,

CHARLES FRIED
Counsel of Record
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

Paul M. Friedberg
Webster J. Arceneaux, III
Richard L. Gottlieb
LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS
Suite 700–One Valley Square
P.O. Box 1746
Charleston, West Virginia 25326
(304) 345-2000

Jonathan I. Blackman
Howard Zelbo
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for Petitioner CSR Limited

APPENDICES

APPENDIX A

SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21994

Submitted Jan. 11, 1994

Decided Feb. 17, 1994

Concurring Opinion of Justice Miller
April 1, 1994

STATE of West Virginia ex rel. CSR LIMITED,

Petitioner,

—v.—

Honorable A. Andrew MacQUEEN, III, Judge of the Circuit Court of Kanawha County, Clifford Bostic, Raymond Daugherty, Clark Dillon, Andrew Gray, James Harper, Donald Horstman, Herbert Riggs, Robert Shannon, Charles Skiles, Dewey Turley, Orville Windle, Walter Uttermohlan, et al.,

Respondents.

In consolidated asbestos case, sales agent for subsidiary which mined raw asbestos fibers in Australia sought rule to show cause in prohibition to challenge trial court's denial of sales agent's motion to dismiss complaints for lack of personal jurisdiction. The Supreme Court of Appeals, Neely, J., held that West Virginia had personal jurisdiction over sales agent, since sales agent introduced its fibers into stream of American commerce, knew that products containing fibers

would be distributed throughout United States, had ongoing commercial relationship with the largest American manufacturer of asbestos products, and was actively engaged in development and introduction of products that contained its raw materials.

Writ denied.

Miller, J., concurred and filed opinion.

Syllabus by the Court

1. "Personal jurisdiction 'premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause' and can be exercised without the need to show additional conduct by the defendant aimed at the forum state. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 117, 107 S.Ct. 1026, 1034, 94 L.Ed.2d 92 (1987)." Syllabus Point 2, *Hill by Hill v. Shoua Denko, K.K.*, 183 W.Va. 654, 425 S.E.2d 609 (1992).

2. In determining whether our courts have jurisdiction under the stream of commerce theory articulated in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), the rule in West Virginia will always be congruent with the outer edge of the due process envelope that, as determined by the Supreme Court of the United States, circumscribes jurisdiction.

Paul M. Friedberg, Lewis, Friedberg, Glasser, Casey & Rollins, Charleston, James McLaughlin, Morgantown, *for petitioner*.

Scott S. Segal, Segal & Davis, Charleston, Ronald P. Motley, Ness, Motley, Loadholt, Richardson & Poole, Charleston, SC, Arthur R. Miller, Cambridge, MA, *for respondents*.

NEELY, *Justice*:

CSR Limited (hereinafter "CSR") is a new and unique type of defendant in that black hole of litigation—consolidated asbestos cases. Between 1948 and 1966 CSR was sales agent for its partially-owned subsidiary that mined raw asbestos fibers. The raw asbestos fibers were sold F.O.B. Freemantle, Australia and other ports in Western Australia to Johns Manville Corporation which then delivered them to the United States. Because Johns Manville had its own mines and purchased asbestos fibers from several other mines throughout the world, Johns Manville received only a small portion of its asbestos fibers from CSR.

CSR maintains that once it ceased as sales agent for its partially-owned subsidiary, it had no influence, control or even substantive knowledge concerning the use and distribution of the asbestos fibers. According to CSR, neither CSR nor any of its subsidiaries have been engaged in the manufacturing, processing, importing, conversion, and selling of, or otherwise involved with asbestos-containing products in the United States.

Based on these contentions, CSR, alleging lack of personal jurisdiction, moved to dismiss the complaints filed against it in a consolidated asbestos case known as Mass III in the Circuit Court of Kanawha County. Chief Judge A. Andrew MacQueen denied CSR's motion to dismiss the complaints. CSR then sought a rule to show cause in prohibition to challenge Judge MacQueen's ruling on jurisdiction.

The plaintiffs below (respondents here) assert that CSR mined substantial quantities of crocidolite asbestos (commonly known as "blue fiber") and sold this asbestos in the United States exclusively to Johns Manville, one of the world's largest manufacturers of asbestos products. Johns Manville in turn sold products containing CSR's asbestos throughout the United States. According to the plaintiffs-respondents, CSR's involvement extended far beyond mining and delivering the asbestos fibers FOB the dock in Australia in blissful ignorance of the fibers' final destination.

Specifically, the plaintiffs-respondents contend that CSR sought to exploit the American market for raw asbestos by systematically and continuously selling substantial quantities (37,000 tons) of crocidolite asbestos to Johns Manville between 1948 and 1966. CSR's own sales records, plaintiffs-respondents argue, show that CSR shipped fiber to ports in various states. Notably, CSR does not contest jurisdiction in the states to which the fiber then was routed—specifically, Johns Manville plants located in Louisiana, New Jersey, Illinois, Texas and California.[1]

In short, the plaintiffs-respondents assert that the evidence below establishes or will establish the following: CSR representatives had a vital interest in Johns Manville's manufacture and distribution of CSR's raw asbestos in the United States; CSR actively pursued sales to Johns Manville and other manufacturers of building materials for the United States market; CSR frequently visited Johns Manville to obtain information about the products Johns Manville was manufacturing with its asbestos; and CSR played an active role in Manville's product development to encourage use of its blue crocidolite fiber. In the thick of all this activity, the plaintiffs-respondents contend, CSR could not conceivably have been unaware that its asbestos was being used in products widely distributed by Johns Manville throughout all of the United States including, obviously, West Virginia.

At oral argument, it became apparent that CSR has confused jurisdictional issues with questions of CSR's innocence of wrongdoing. In a nutshell, CSR argues that as simply a manufacturer of raw materials, it is not liable to the plaintiffs in this mass tort case. Unlike a manufacturer of a defective component part that caused some end product to fail, CSR contends its role was more comparable to a manufacturer of raw steel, with no control over the end product into which its raw material was incorporated.

This Court, however, is satisfied that CSR introduced a product into the stream of American commerce that it knew would be used in West Virginia. "Personal jurisdiction

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[1] We note that CSR made these representations at oral argument.

'premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause' and can be exercised without the need to show additional conduct by the defendant aimed at the forum state." *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 117, 107 S.Ct. 1026, 1034, 94 L.Ed.2d 92 (1987); Syllabus Point 2, *Hill by Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 425 S.E.2d 609 (1992).

That CSR, as it readily concedes, is currently being sued in asbestos cases in the State of Mississippi where its contacts are roughly the same as they are in West Virginia dramatizes the stickiness of the problem inherent in attempting to peel questions of jurisdiction from liability issues. We are not unsympathetic to CSR's plight: it is subject to suit in all fifty states and a determination in one state that, on the merits, CSR is not liable because it manufactured only raw materials and had no knowledge that its raw materials were being used in a dangerous way will, nonetheless, not be binding in any other jurisdiction.

If for a moment, however, we assume that the plaintiffs-respondents are able to prove that CSR was part of a scheme to profit through the sale of a product known to be dangerous, then, having declined to assert jurisdiction, Mississippi plaintiffs (and plaintiffs in such other states as may accede to jurisdiction) will ravish whatever insurance fund CSR has available to pay injured plaintiffs at the expense of West Virginia plaintiffs. *See Blankenship v. General Motors* 185 W.Va. 350, 406 S.E.2d 781 (1991). Accordingly, we hold today that in determining whether our courts have jurisdiction under the stream of commerce theory articulated in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), the rule in West Virginia will always be congruent with the outer edge of the due process envelope that, as determined by the Supreme Court of the United States, circumscribes jurisdiction. Thus, whenever there are "such minimum contacts with the state of the forum that the maintenance of an action in the forum does not offend traditional notions of fair play and substantial jus-

tice," Syllabus Point 1, in part, *Hodge v. Sands Manufacturing Company,* 151 W.Va. 133, 150 S.E.2d 793 (1966); Syllabus Point 1, in part, *Hill by Hill v. Showa Denko, K.K., supra,* the courts of this State will assert jurisdiction.

Obviously, as the Supreme Court of the United States held in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 294, 100 S.Ct. 559, 565, 62 L.Ed.2d 490 (1980), jurisdiction cannot be asserted over a defendant with which a state has no contacts, no ties and no relations. However, in the case before us, the evidence is virtually incontrovertible that CSR introduced its asbestos fibers into the stream of American commerce; CSR knew the products containing their fibers would be distributed throughout the United States; CSR had an ongoing commercial relationship with Johns Manville, the largest American manufacturer of asbestos products; and, CSR was actively engaged in the development and introduction of products that contained their raw materials. These circumstances are sufficient at this time to give our courts jurisdiction.

Accordingly, the writ of prohibition for which petitioner prays is denied.

Writ denied.

MILLER, J., concurs and files a concurring opinion.

MILLER, *Justice,* concurring:

Initially, I voted to grant this proceeding for a writ of prohibition based on the petition of CSR Limited. CSR represented there were no facts that would establish personal jurisdiction over it in the Circuit Court of Kanawha County. It relied, in part, on the principles announced in *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). We followed *Asahi Metal* in *Hill by Hill v. Showa Denko, K.K.,* 188 W.Va 654, 425 S.E.2d 609 (1992), cert. denied, — U.S. —, 113 S.Ct. 2338, 124 L.Ed.2d 249 (1993), where we stated in Syllabus Point 2:

> "Personal jurisdiction 'premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause' and can be exercised without the need to show additional conduct by the defendant aimed at the forum state. As *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102, 117, 107 S.Ct. 1026, 1034, 94 L.Ed.2d 92 (1987)."

Contrary to the United States Supreme Courts conclusion in *Asahi Metal,* we found in *Showa Denko* sufficient contact under the stream of commerce theory to warrant personal jurisdiction in West Virginia courts. A procedural point common to both cases and which bears emphasizing is that both appeals had a developed factual record on the jurisdictional issue.

In this case, when the matter was fully argued, it was apparent that neither side could agree as to what could constitute the factual record. We were given three transcripts of hearings before the trial court and appendices with attached documents designed to bolster each party's factual claims. When it denied the motion to dismiss, the circuit court made no findings of fact.[1]

The underlying civil action is a mass asbestos is proceeding which involves some eighty corporate defendants. The initial hearing on the lack of personal jurisdiction occurred on November 9, 1993. Plaintiffs' counsel admitted that he had misunderstood the nature of the hearing and was not prepared to argue the jurisdictional issue.

At the next hearing on November 15, 1993, the plaintiffs apparently tendered a variety of materials harvested from discovery or exhibits in other asbestosis cases. This material

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[1] My remarks as to the proceedings before the circuit court are not meant in any manner as a condemnation of his actions. The circuit court judge decided the motion to dismiss in a conscientious fashion. He was fully aware, I am sure, that as the evidence developed at trial, he might determine there was not sufficient personal jurisdiction and CSR could be dismissed. The true mistake was ours in granting the petition seeking a writ of prohibition without realizing the obvious, that there would be disputed facts on the personal jurisdiction issue.

included a recent Mississippi case where the personal jurisdiction issue was raised unsuccessfully by CSR. The nature of this material is not identified with any particularity in the hearing transcripts. After hearing arguments by the attorneys, the circuit court advised it would go over the material and issue a ruling the next day. The following day, CSR's motion to dismiss was denied with the circuit court emphasizing Syllabus Point 2 of *Showa Denko, supra*.

Despite the majority's attempt to frame facts that will support its conclusion, I am convinced that many of the facts are in serious dispute by the parties. My ultimate conclusion is that a writ of prohibition is unavailable on this type of issue, even under the liberal standard first enunciated in Syllabus Point 1 of *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979):

> "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way *to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts* and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." (Emphasis added).

See also Syllabus Point 6, State *ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569 (1993); Syllabus Point 12, *Glover v. Narick*, 184 W.Va. 381, 400 S.E.2d 816 (1990).

It certainly cannot be said in this case that there was a clear legal error that could be resolved independently of any disputed facts. The entire question of personal jurisdiction was a factual one surrounded by disputed facts.

Consequently, while I agree that the writ of prohibition should be denied, I do not agree with the majority's substantive holding, as I believe it is not supported by the facts. I would dismiss the writ on the procedural ground that it does not meet the *Hinkle* test. It is for this reason that I concur.[2]

---

[2] CSR's adverse ruling on its motion to dismiss does not constitute a final order under Rule 54 of the West Virginia Rules of Civil Procedure. Thus, after an adverse judgment on the merits, CSR may appeal and raise its personal jurisdiction issue. The right to appeal is another reason for not initially granting prohibition.

STATE OF WEST VIRGINIA

No. 21994

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th day of February, 1994, the following order was made and entered:

State of West Virginia ex rel. CSR Limited,

Petitioner,

—vs.—

Honorable A. Andrew MacQueen, III, Judge of the Circuit Court of Kanawha County, Clifford Bostic, Raymond Daugherty, Clark Dillon, Andrew Gray, James Harper, Donald Horstman, Herbert Riggs, Robert Shannon, Charles Skiles, Dewey Turley, Orville Windle, Walter Uttermohlan, et al.,

Respondents.

The Court, having maturely considered the petition for a writ of prohibition, the rule awarded thereon, and the oral argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that the petitioner is not entitled to the writ of prohibition prayed for in its said petition. It is therefore considered and ordered by the Court that the writ of prohibition prayed for in this proceeding be, and the same hereby is, denied, and the rule heretofore awarded is discharged.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Neely, was concurred in by Chief

Justice Brotherton and Justices Miller, McHugh and Workman. Justice Miller reserves the right to file a concurring opinion.

A True Copy

Attest: /s/ ANCIL H. RAMEY
Ancil H. Ramey
Clerk, Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

IN RE: ASBESTOS III
CIVIL ACTION NO. 92-C-8888

ORDER REGARDING MOTION TO DISMISS OF
CSR LIMITED

On November 15, 1993, this matter came on for hearing on the motion of Defendant CSR Limited to dismiss this action as to it for lack of personal jurisdiction under Rule 12 (b) 2 of the West Virginia Rules of Civil Procedure.

Having considered CSR Limited's Motion, an Affidavit of Peter Lovell and a Supplemental Affidavit of Frazer Brian Gill in Support of the Motion, an initial and responsive Memorandum in Support of the Motion, Plaintiffs' Response to the Motion, and argument of both parties, the Court hereby DENIES the Motion to Dismiss.

ENTERED:

/s/ A. ANDREW MACQUEEN
A. Andrew MacQueen, Judge
11/16/93

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

IN RE: ASBESTOS MASS TRIAL, III

Civil Action No. 92-C-8888

BEFORE: Hon. A. Andrew MacQueen

Ruling - RE: CSR

November 16, 1993

Connie L. Cooke
Official Reporter

BE IT REMEMBERED, that on Tuesday, the 16th day of November, 1993, during the September 1993 Term of said Court, in the matter of IN RE: ASBESTOS MASS TRIAL, III, upon Civil Action Number 92-C-8888, the following transpired:

THE COURT: I've just been scratching some things out here. Let's go ahead and get CSR's motion resolved today.

Let me just be candid. I have vacillated just about as much as I have on any legal question with this question of personal jurisdiction over CSR. Initially, it appeared to me to be about as clear as anything could that we couldn't have any jurisdiction over CSR and began reading the cases and trying to digest them for the substantive law to sustain my suspicions and changed my mind completely. And then following the arguments yesterday, I, frankly, had to go back and completely reassess my views.

In the back of all of this is my own notion of where the law is and is going in this area. I read the decisions of the United States Supreme Court primarily to indicate a general trend of the law to mirror commerce, and by that I mean that while our law generally respects territorial boundaries because those territorial boundaries reflect often significant differences in law, commerce doesn't. And I think that that is probably what the expression of Justice Brennan and his three colleagues indicates.

Having said that, I'm not at all sure that the decisions of the United States Supreme Court answer the questions that I have in front of me. The only really probative thing that I could find was the fact that the United States Supreme Court refused to accept jurisdiction in our *Showa-Danko* [sic] case. And after reviewing this *Showa-Danko* [sic] case, I have concluded that notwithstanding the fact that the opinion is punctuated by observations to issues that are not particularly relevant to a stream of commerce rule, that the Court has clearly adopted the stream of commerce rule.

The second Syllabus point couldn't be any clearer, and that was the area where I got bogged down yesterday. The language of that is that "personal jurisdiction can be exercised without the need to show additional conduct by the defendant named in the forum state." My understanding is that the stream of commerce notion is that if a manufacturer puts his product in the stream of commerce, that he can be held accountable wherever he is found, that is, that he will not be heard to object that he didn't expect his product to appear in whatever forum or jurisdiction it appeared in.

Based upon that conclusion and also the evaluation—there are other factors which our Supreme Court identified essentially factors that relate to the interests of the forum state in resolving the disputes, and I think probably it's tough to make an argument in this case that the State of West Virginia doesn't have an interest in resolving these disputes, you've got somewhere between 8,000 and 10,000 cases with somewhere between 90 and 100-plus defendants, all of these cases have to be resolved in a manner that comes as closely as possible to being final. That gives the State of West Virginia, it seems to me, what seems to me to be a compelling interest for the conclusion that there is personal jurisdiction in this case over CSR.

APPENDIX C

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS MASS TRIAL, III

Civil Action No. 92-C-8888

BEFORE: Hon. A. Andrew MacQueen

November 15, 1993

Motion of CSR to Dismiss [excerpts]

Connie L. Cooke

Official Reporter

[3] BE IT REMEMBERED, that on Monday, the 15th day of November, 1993, during the September 1993 Term of said Court, in the matter of IN RE: ASBESTOS MASS TRIAL, III, upon Civil Action No. 92-C-8888, as stated in the caption hereto, the following transpired:

* * *

[21] THE COURT: No matter whether you take the conservative or liberal view of—

MR. GOTTLIEB: Well, sure.

THE COURT:—the stream of commerce, do you think that that really is—I mean, there isn't any question that your client sold raw material which it knew or should have known was going to be sold by Johns-Manville in the United States.

The fact that it was sold in south Florida or western Tennessee doesn't make a lot of difference, does it?

MR. GOTTLIEB: Absolutely it does, Your Honor.

THE COURT: Do you think that the folks in Australia in 1957 had any idea where West Virginia was?

MR. GOTTLIEB: You're absolutely right. They had no idea that West Virginia even existed. And if you look at what the West Virginia Supreme Court—

THE COURT: Now, the same thing is true with Americans and three-quarters of Australia as well.

What difference does it make?

* * *

[23] The foreign distributor, manufacturer or miner that—knows that it's in its best interest that it be widely distributed throughout whatever the geography of the United States is.

MR. GOTTLIEB: Your Honor—

THE COURT: It doesn't have to be a sophisticated dealer in merchandise. It doesn't have to comprehend the borders of the various states which are inconsequential insofar as the economies that are distributing the product are concerned.

* * *

BEST AVAILABLE COPY

No. 93-2036

Supreme Court, U.S.
FILED
AUG 2 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

STATE OF WEST VIRGINIA *ex rel.* CSR LIMITED,

Petitioner,

v.

THE HONORABLE A. ANDREW MACQUEEN, III, Judge of the Circuit Court of Kanawha County, CLIFFORD BOSTIC, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION

ARTHUR R. MILLER
Counsel of Record
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4111

HOWARD B. STRAVITZ
USC LAW CENTER
Main and Greene Streets
Columbia, South Carolina 29208
(803) 777-6860

RONALD L. MOTLEY
ANN K. RITTER
JAMES M. HUGHES
NESS, MOTLEY, LOADHOLT,
RICHARDSON & POOLE
Suite 600
151 Meeting Street
Post Office Box 1137
Charleston, South Carolina 29402
(803) 577-6747

Counsel for Respondents

August 2, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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THEODORE GOLDBERG
TYBE A. BRETT
GOLDBERG, PERSKY,
JENNINGS & WHITE, P.C.
1030 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 471-3980

SCOTT S. SEGAL
SEGAL & DAVIS, L.C.
810 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 344-9100

Counsel for Respondents

RESTATED QUESTIONS PRESENTED

For almost twenty years CSR systematically and continuously sold raw asbestos, and promoted the sale and new product development of asbestos, to the Johns Manville Corporation, which acted for a time as CSR's exclusive agent for the sale of asbestos in North and South America, and which manufactured and distributed products containing CSR's asbestos throughout the United States, including West Virginia.

1. May West Virginia constitutionally assert jurisdiction over CSR on tort claims by parties injured in West Virginia from exposure to products containing CSR's asbestos?

2. Does jurisdiction over CSR comport with fair play and substantial justice when plaintiffs have been injured in West Virginia from exposure to products containing CSR's asbestos and when the West Virginia court constitutionally may apply its own law to plaintiffs' claims?

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No. 93-2036

In The

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Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari to review the order of the Supreme Court of Appeals of West Virginia in this case.

JURISDICTION

The Supreme Court of Appeals of West Virginia denied the petition of CSR Limited ("CSR") for a writ of prohibition. The preliminary decision below, which is subject to further review and determination by the West Virginia courts, is not a final judgment. Accordingly, the order and opinion below are not subject to review by the Court at this time. *See infra* Reason I for Denying the Writ.

STATEMENT OF THE CASE

The case below arises from a consolidated asbestos mass proceeding in the West Virginia state courts. Over 11,000 plaintiffs have brought claims for asbestos related injuries against approximately 94 defendants, who participated in the manufacture of asbestos containing products and their distribution in West Virginia. One of these defendants is Petitioner CSR, which in its own Statement of the Case asks this court to review the case below to resolve the issue that divided the Court in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). (Pet. at 2-3.) That issue – whether minimum contacts can be established by mere awareness that the defendant's product is being distributed in the forum state or whether something more is required – is not presented here because jurisdiction over CSR comports with all three standards articulated in *Asahi*. *See infra* Reason II for Denying the Writ.

The proceedings in the courts below established that CSR had a business relationship with the Johns Manville Corporation ("Manville") since the 1930s. (Resp'ts' Mem. Law Resp. Rule Show Cause (No. 21994) Attach. 2 at 12 [hereinafter Attach.].) In the early and mid 1940s, CSR, through a subsidiary named Australian Blue Asbestos Pty. Ltd., started to mine crocidolite asbestos, known as "blue fiber," at Wittenoom Gorge, Australia. (Attach. 1; Attach. 10 at 15.) In 1945, a CSR representative visited Manville's plant in Manville, New Jersey, and observed the manufacture of various asbestos products, including Manville's Transite pipe. (Attach. 13; Attach. 14 at 67.) In February 1946, after CSR increased its asbestos production, CSR's Board of Directors decided to pursue a formal arrangement with Manville for the sale of blue asbestos. (Attach. 7 at 5.) Shortly thereafter Manville entered into a contract with CSR under which Manville for a time became CSR's exclusive agent for the sale of Australian blue asbestos fiber in the United States, Canada, Mexico, and Central and South America. (Attach. 1.)

After it started purchasing raw asbestos from CSR, Manville manufactured No. 83-S and No. 84-S Sheet Packing and Transite Pressure Pipe, frequently using CSR's Australian blue crocidolite fiber. (*See* Attach. 5; Attach. 6.) Between 1948 and 1966, CSR sold and supplied 37,000 tons of raw asbestos to Manville. (Attach. 6 at 81.) CSR's asbestos was shipped from Australia to several United States ports, including New York, New Orleans, Los Angeles, and San Francisco. (*See* Attach. 4.) The raw asbestos was directed from the ports of entry to Manville plants located across the United States. (*See, e.g.*, Attach. 5.) CSR's asbestos was used by Manville to manufacture building materials, which were sold throughout the United States, including, of course, West Virginia.[1]

Affidavits in the courts below showed that plaintiffs in the litigation were exposed in West Virginia to Manville Sheet Packing and Transite Pressure Pipe containing CSR asbestos.[2] The plaintiffs also established that CSR had a vital interest in the uses Manville made of its asbestos, actively pursued sales to other manufacturers of building materials for the United States market, frequently visited Manville to obtain data on products manufactured by Manville with CSR asbestos, and played an active role in Manville's product development by suggesting other manufacturing uses for CSR asbestos. (*See* Attach. 2 at 107, 129-30, 132; Attach. 8 at 23; Attach. 16; Attach. 18; Attach. 19.)

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[1] A copy of a Manville brochure, available to CSR and all others in the asbestos industry, described Manville's Transite Pressure Pipe and listed Manville sales offices throughout the country, including one in Charleston, West Virginia. (Attach. 26.)

[2] *See* Attach. 17. Although CSR asserts that "it is impossible to determine by inspection or analysis the origin of the raw fiber in the finished product," (Pet. at 3), documents before the courts below established that the products Manville frequently manufactured with CSR asbestos were sold and used in West Virginia. *See supra* note 1. These documents, other Manville internal documents, and evidence plaintiffs anticipate offering at trial will enable a jury to conclude by a preponderance of the evidence that plaintiffs were exposed to CSR's asbestos in West Virginia.

Thus, the record plainly showed that for almost twenty years CSR was a systematic and continuous supplier of raw asbestos to Manville, which manufactured and distributed products containing CSR's asbestos throughout the United States, including West Virginia. Since West Virginia tort law contemplates joint and several liability for all defendants in the chain of distribution of a dangerous product causing injury in West Virginia, CSR was named as a defendant in several actions filed in the circuit courts of various West Virginia counties.[3]

In all pending cases in which it was a named defendant, CSR moved to dismiss for lack of personal jurisdiction. On November 15, 1993, the trial court reviewed the evidence and heard legal arguments on CSR's motion to dismiss. The transcript of this argument is 80 pages. On November 16, 1993, the trial judge denied CSR's motion to dismiss. CSR sought review of this ruling by writ of prohibition, which the West Virginia Supreme Court of Appeals denied on February 17, 1994. Rehearing was denied on March 23, 1994, and CSR's Petition for a Writ of Certiorari was filed on June 20, 1994.

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[3] All these actions have been consolidated before the Honorable A. Andrew MacQueen, III, Judge of the Circuit Court of Kanawha County, a respondent in this proceeding, in an action styled "*In re Asbestos Mass Trial III,* Civil Action No. 92-C-8888."

REASONS FOR DENYING THE WRIT

I. THE DECISIONS BELOW ARE NOT FINAL JUDGMENTS BECAUSE THE FEDERAL ISSUE WAS ONLY PRELIMINARILY DETERMINED, AND THAT ISSUE IS SUBJECT TO FURTHER REVIEW AND DETERMINATION IN THE WEST VIRGINIA COURTS

CSR challenged jurisdiction in the trial court by motion to dismiss for lack of personal jurisdiction under West Virginia Rule of Civil Procedure 12(b)(2).[4] When jurisdiction is challenged at the Rule 12(b)(2) stage, without an evidentiary hearing,[5] a plaintiff need only present a *prima facie* case that personal jurisdiction is proper. *Francosteel Corp. v. M/V Charm*, 19 F.3d 624, 626 (11th Cir. 1994) (when a court does "not conduct an evidentiary hearing on the jurisdictional issue, plaintiffs . . . need only make out a *prima facie* case of jurisdiction").[6] In determining whether a plaintiff meets this

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[4] In the absence of West Virginia law interpreting a West Virginia Rule of Civil Procedure, West Virginia courts rely on federal court decisions interpreting the counterpart Federal Rule of Civil Procedure when the two Rules are substantially similar. *Cf. Dunn v. Consolidation Coal Co.*, 379 S.E.2d 485, 488 n.7 (W. Va. 1989).

[5] West Virginia trial courts may conduct preliminary hearings on any Rule 12(b) defense on the application of any party. W. Va. R. Civ. P. Rule 12(d).

[6] *Accord Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994) ("When the . . . court rules on the motion without an evidentiary hearing, the plaintiff may bear his burden by presenting a *prima facie* case that personal jurisdiction is proper."); *Clark v. Milam*, 830 F. Supp. 316, 318-19 (S.D. W. Va. 1993) ("[P]laintiff bears the burden of ultimately proving by a preponderance of the evidence the existence of . . . jurisdiction. But [when] the court addresses the challenge only on the motion papers, supporting legal memoranda, affidavits, other documents, and the relevant allegations of the complaint, the burden on the plaintiff is to make a mere *prima facie* showing of jurisdiction to survive the jurisdictional challenge.").

CSR conceded in the court below that plaintiffs' burden on a Rule 12(b)(2) motion was merely to establish jurisdiction under the *prima facie* standard. (*See* Mem. Law Supp. CSR Pet. Writ Prohib. (No. 21994) at 10.)

The rule that a plaintiff need only make a *prima facie* showing of jurisdiction is not inconsistent with *Norfolk Southern Railway v. Maynard*, 437 S.E.2d 277 (W. Va. 1993), in which the court stated, "[A] plaintiff has the burden of establishing

threshold burden when the jurisdictional facts are disputed, courts typically "resolve all conflicts in favor of the party seeking to invoke the court's jurisdiction." *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 418 (5th Cir. 1993).[7] If a defendant's Rule 12(b)(2) motion is denied under the *prima facie* standard, the issue of personal jurisdiction remains open, and may be redetermined at a Rule 12(d) evidentiary hearing, on a motion for summary judgment, or at trial on the merits. If personal jurisdiction is tested at any of these later stages of the litigation, jurisdiction must be established by a preponderance of the evidence. *See* cases cited *supra* notes 6 & 7.

A court's determination of the federal issue is final and not subject to further review only if jurisdiction is established

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personal jurisdiction over a defendant and if jurisdiction is challenged by a defendant, 'a hearing is required at which the plaintiff must establish personal jurisdiction by a preponderance of the evidence.' " *Id.* at 284 n.6 (quoting *Palmieri v. Estefan*, 793 F. Supp. 1182, 1186 (S.D.N.Y. 1992)).

The court's statement is correct. If jurisdiction is tested at a preliminary hearing pursuant to Rule 12(d), on a motion for summary judgment under Rule 56, or at trial on the merits, jurisdiction must be established by a preponderance of the evidence. *See, e.g., A.I. Trade Fin. Inc. v. Petra Bank*, 989 F.2d 76, 79 (2d Cir. 1993) ("Eventually personal jurisdiction must be established by a preponderance of the evidence, either at an evidentiary hearing or at trial."); *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir.) (discussing appropriate evidentiary standard to resolve factual disputes when jurisdiction is tested at various stages of litigation), *cert. denied*, 498 U.S. 854 (1990).

[7] *Accord A.I. Trade Fin.*, 989 F.2d at 79-80 (stating that at the Rule 12(b)(2) stage "all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party"); *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989); *Morris v. SSE, Inc.*, 843 F.2d 489, 490-92 (11th Cir. 1989); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 848 F. Supp. 271, 272-73 (D. Mass. 1994); *Eastern Mktg. Corp. v. Texas Meridian Prod. Co.*, 798 F. Supp. 363, 364 (S.D. W. Va. 1992) (West Virginia federal court sitting in diversity) ("all conflicts of fact must be resolved in favor of the plaintiff for purposes of determining whether a *prima facie* showing of jurisdiction has been made"); *Hart Holding Co. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991); *Davis v. Eighth Judicial District Court*, 629 P.2d 1209, 1212-13 (Nev.), *cert. denied*, 454 U.S. 1055 (1981); *Ben's Marine Sales v. Sleek Craft Boats*, 502 A.2d 808, 810 & n.1 (R.I. 1985).

under the ordinary civil preponderance standard. The lack of finality on the federal issue was recognized below in the concurring opinion of Justice Miller when he observed that even though the trial judge denied CSR's Rule 12(b)(2) motion, "[h]e was fully aware . . . that *as the evidence developed at trial*, he might determine there was not sufficient personal jurisdiction and *CSR could be dismissed*." (Pet. at 7a n.1 (emphasis added).) Justice Neely's majority opinion also perceived the preliminary nature of the jurisdictional finding when it concluded:

> [I]n the case before us, the evidence is virtually incontrovertible that CSR introduced its asbestos fibers into the stream of American commerce; CSR knew the products containing their fibers would be distributed throughout the United States; CSR had an ongoing commercial relationship with Johns Manville, the largest American manufacturer of asbestos products; and, CSR was actively engaged in the development and introduction of products that contained their raw materials. These circumstances are sufficient *at this time* to give our courts jurisdiction.

(Pet. at 6a (emphasis added).)

CSR could have objected to the final resolution of its jurisdictional challenge until the trial on the merits by requesting a Rule 12(d) preliminary hearing, at which the trial court would have been required to resolve factual disputes relating to jurisdiction under the preponderance of the evidence standard. *See Norfolk S. Ry. v. Maynard*, 437 S.E.2d 277, 284 n.6 (W. Va. 1993). Since CSR failed to request a preliminary hearing, the jurisdictional issue was not finally determined in the West Virginia courts, and the issue is subject to further review by the courts below. Accordingly, there is no final judgment for this Court to review under 28 U.S.C. § 1257(a).

In the past seventeen years, this Court has reviewed seven state court determinations of personal jurisdiction prior to trial on the merits.[8] But review has been accorded only when the Court has been convinced that the state court judgments were plainly final on the jurisdictional issue and not subject to further review in the state court systems. *See, e.g., Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984) (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975); *Shaffer v. Heitner*, 433 U.S. 186, 195-96 n.12 (1977)).

Furthermore, the cases reviewed involved no material factual disputes requiring further litigation in the state courts. In contrast, as Justice Miller candidly acknowledged in concurring below, it was obvious "that there would be *disputed facts on the personal jurisdiction issue*." (Pet. at 7a n.1 (emphasis added).) He further concluded: "It certainly cannot be said in this case that there was a clear legal error that could be resolved independently of any *disputed facts. The entire question of personal jurisdiction was a factual one surrounded by disputed facts*." (*Id.* at 8a (emphasis added).)

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[8] *Burnham v. Superior Court*, 495 U.S. 604, 608 (1990); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108 (1987); *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984); *Rush v. Savchuk*, 444 U.S. 320, 324-25 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288-91 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 88-90 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977).

Of these seven cases, four were from California (*Burnham*, *Asahi*, *Calder*, and *Kulko*), and one each was from Delaware (*Shaffer*), Minnesota (*Rush*), and Oklahoma (*World-Wide Volkswagen*). California and Oklahoma allow defendants to challenge jurisdiction by special appearance. In these cases the federal issue apparently is finally resolved by the proceedings on the special appearance.

Shaffer and *Rush* involved assertions of quasi-in-rem jurisdiction, in which defendants' property was sequestered or garnished, raising separate due process concerns not present when in personam jurisdiction is asserted. These two cases also were plainly final on the federal question and appealable to this Court under pre-1988 practice because the state courts upheld the constitutionality of their own statutes in the face of a federal constitutional challenge. *Cf. Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 475 (1975). Moreover, there was no dispute over the jurisdictional facts in either case.

Since the trial court denied CSR's Rule 12(b)(2) motion without conducting a Rule 12(d) evidentiary hearing, it presumably applied the *prima facie* standard in resolving factual disputes relating to the jurisdictional issue. In denying the Writ of Prohibition on the record as developed, Justice Miller recognized that factual disputes pertaining to personal jurisdiction remained open for reconsideration. (Pet. at 7a n.1.) *See Norfolk S. Ry.*, 437 S.E.2d at 284 n.6 (at the preliminary hearing stage, jurisdiction must be established by a preponderance of evidence). He even noted that "CSR's adverse ruling on its motion to dismiss does not constitute a final order under Rule 54 of the West Virginia Rules of Civil Procedure. Thus, after an adverse judgment on the merits, CSR may appeal and raise its personal jurisdiction issue." (Pet. at 9a n.2.) Clearly, the jurisdictional issue has not been finally decided in the West Virginia courts and is not ripe for review by this Court.

II. THE "MINIMUM CONTACTS" ISSUE LEFT OPEN BY *ASAHI* CANNOT BE RESOLVED BY REVIEW OF THE DECISION BELOW

Asahi articulated three standards for establishing minimum contacts. Justice O'Connor's opinion concluded that "[t]he placement of a product into the stream of commerce, *without more*, is not an act of the defendant purposefully directed toward the forum State." 480 U.S. at 112 (emphasis added). Her opinion, however, recognized that "[a]dditional conduct of the defendant" may be sufficient to establish minimum contacts. *Id.* In contrast, Justice Brennan's opinion articulated a pure stream of commerce view; *i.e.*, that mere awareness that a product was being distributed in the forum state was sufficient to establish minimum contacts without any showing of "something more." *Id.* at 117. Justice Stevens did not join either plurality, but wrote separately suggesting that "a regular course of dealing [by a defendant] that results in deliveries . . . annually over a period of years" should be

jurisdictionally sufficient even for a "standard product marketed throughout the world." *Id.* at 122.

The issue that splintered the *Asahi* Court cannot be resolved by review of this case because jurisdiction was demonstrated below over CSR under all three *Asahi* standards. CSR does not dispute that minimum contacts are established with West Virginia under the view expressed by Justice Brennan.[9] In addition, CSR cannot seriously question that application of Justice Stevens's analysis also would result in a finding of minimum contacts. CSR had a regular course of dealing with Manville over a long period of time, including an exclusive agreement for some of this period under which Manville acted as CSR's agent for the sale of blue asbestos in the Western Hemisphere pursuant to which CSR systematically and continuously supplied Manville with the raw asbestos fiber that contributed to the plaintiffs' injuries in West Virginia. Justice Stevens also considered "the volume, the value, and the hazardous character" of a defendant's product. *Id.* at 122. Certainly, delivery of 37,000 tons of raw asbestos over a twenty-year period passes muster under this quantitative and qualitative analysis.

Most significantly, even under the "something more – additional conduct" standard expressed by Justice O'Connor, CSR had minimum contacts with West Virginia. Although the Petition labors to explain away statements in the West Virginia court's opinion establishing this "additional conduct," (Pet. at 7), CSR did not disavow its "additional conduct" and this "additional conduct" satisfies even the more demanding view of minimum contacts expressed by Justice O'Connor.

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[9] CSR concedes that if the Court adopts the pure stream of commerce view of Justice Brennan, then the only issue is whether jurisdiction is proper under the "fair play and substantial justice" component of the two-branch jurisdictional due process test. (*See* Pet. at 3.)

CSR acknowledges that the trial court reviewed materials submitted by the parties and heard legal arguments. (Pet. at 5.) If the trial judge credited, as he must have, documents showing that CSR met regularly with Manville to sell and promote sales of its asbestos and to suggest new uses for its blue asbestos, and also regularly solicited other manufacturers of building materials for the United States market, at the very least plaintiffs made a *prima facie* showing of facts sufficient to establish minimum contacts under the "something more – additional conduct" standard set forth in Justice O'Connor's opinion.

Asahi, in contrast, was a pure stream of commerce case that did not satisfy this standard. Asahi had no contact with California other than the sale there by others of finished products manufactured by others containing Asahi's component parts. There was no evidence suggesting visits to sell and promote Asahi's products in the United States. Indeed, there was no direct connection to the United States at all. The Japanese component part manufacturer merely sold valve stem assemblies to a Taiwanese purchaser for incorporation into tire tubes, which ultimately found their way in the stream of commerce to the United States. By contrast, from 1948 to 1960, CSR systematically and continuously shipped 37,000 tons of raw asbestos, an inherently dangerous product, directly to Manville in the United States.[10]

Hence, review of the decision below will not clarify the constitutional limits on the exercise of personal jurisdiction over an alien raw material or component part supplier because

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[10] CSR appears to attach significance to the fact that its sales to Manville were "generally" F.O.B. Australia, and that Manville "typically took delivery of the asbestos fiber F.O.B. in Australia." (Pet. at 3.) The delivery terms of product shipments have not had jurisdictional significance since this Court decided *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), almost fifty years ago. In that seminal case, "the merchandise for filling the orders [was] *shipped f.o.b. from points outside Washington* to the purchasers within the state." *Id.* at 314 (emphasis added). The Court's opinion attached no weight whatsoever to that fact.

CSR's additional conduct satisfies even the strictest *Asahi* standard. Resolution of the *Asahi* division should await a pure stream of commerce case in which no "additional conduct" is asserted.

III. ASSERTION OF PERSONAL JURISDICTION OVER CSR IN WEST VIRGINIA COMPORTS WITH THIS COURT'S "FAIR PLAY AND SUBSTANTIAL JUSTICE" STANDARD

CSR claims that the court below disregarded the "fair play and substantial justice" branch of the jurisdictional due process test. (Pet. at 12-15.) This is not an accurate statement of the proceedings below. CSR cannot deny that the parties extensively briefed and devoted substantial oral argument time to the "fair play and substantial justice" standard. Additionally, the West Virginia court plainly recognized that there must be sufficient minimum contacts with the forum state such "*that the maintenance of the action in the forum does not offend traditional notions of fair play and substantial justice.*" (Pet. at 5a-6a (emphasis added).) Furthermore, CSR failed to carry its substantial burden under the "fair play and substantial justice" standard to prove that jurisdiction in West Virginia is unreasonable and unfair. Finally, analysis of the "fair play and substantial justice" standard in the context of this case clearly enhances the conclusion of the court below that CSR is subject to personal jurisdiction in West Virginia.

This Court has explained that beyond the requirement of minimum contacts, due process requires evaluation of other factors to test whether an assertion of jurisdiction comports with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). The other factors relevant to determining whether an assertion of jurisdiction comports with "fair play and substantial justice" are: (1) the burden on the defendant; (2) the adjudicative interest of the forum state; (3) the plaintiff's interest in obtaining

convenient and effective relief; (4) the systemic interest of the national judicial system in obtaining the most efficient resolution of the litigation, and (5) the systemic interest in furthering substantive social policies. *See id.* at 477.

This Court defined the relationship between these factors and traditional minimal contacts in three observations. First, the fairness "considerations sometimes serve to establish the reasonableness of jurisdiction upon a *lesser showing of minimum contacts* than would otherwise be required." *Id.* at 477 (emphasis added). Second, if the minimum contacts requirement is satisfied, the burden shifts to the defendant to show that other factors render jurisdiction unreasonable. *See id.* Third, a defendant "must present a compelling case" that the fairness factors "render jurisdiction unreasonable." *Id.* at 477. CSR has utterly failed to carry this substantial burden. It seeks to obscure that fact by its unwarranted accusation that the court below disregarded the fairness factors.

Indeed, CSR primarily relies on but one of the fairness factors. It merely contends that its 'burden . . . to defend . . . is great." (Mem. Law Supp. CSR Pet. Writ Prohib. (No. 21994) at 20.) Although the Court found burdens on the defendant a significant factor in *Asahi* – because of the distance between Japan and California and because jurisdiction in California would have compelled the Japanese defendant to submit its dispute to a foreign judicial system – these burdens were deemed material only because Justice O'Connor believed that minimum contacts were lacking. *See Asahi*, 480 U.S. at 114. However, as her opinion acknowledged, if "minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even . . . serious burdens . . . on [an] alien defendant." *Id.* at 114. Since minimum contacts are established under all three *Asahi* standards, CSR's reliance on the possible burden

of litigating in West Virginia is unavailing.[11] Certainly it offers no reason for review by this Court, especially in light of its utter failure to meet its burden below.

Additionally, CSR now has substantial and expanding business operations in the United States, and indirectly owns a company licensed to do business in West Virginia,[12] Hydro Conduit Corporation, which is the largest concrete pipe producer in the United States. (Attach. 36 at 6.) CSR's 1990 Annual Report stated that all its United States construction materials businesses are grouped under one holding company, CSR America Inc., and that these businesses include some of the largest construction materials companies in the United States. (*Id.* at 4.) The report also states that CSR's construction materials business in the United States includes 108 separate plants and raw material facilities from coast to coast. (*See id.*) Consequently, any burden argument by CSR is belied by its extensive business operations in the United States. In contrast, the Japanese component part manufacturer in *Asahi* had no known facilities in the United States that it owned.

The inappropriateness of review by this Court of the alleged failure of the courts below to consider the fairness factors is demonstrated by a brief examination of the factors CSR conveniently ignores. West Virginia has a substantial and legitimate interest in exercising jurisdiction over CSR, since it sold dangerous and hazardous asbestos that has

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[11] The Japanese defendant in *Asahi* would have had to submit its claims to an alien and unfamiliar judicial system in California. CSR cannot claim that an American common-law court in West Virginia is similarly alien and unfamiliar because Australia has a judicial system based, as is ours, on English common law.

[12] *See* Attachs. 36 & 37. CSR's 1990 Annual Report states that "business grew strongly and operations in the United States were substantially expanded." It elaborated further: "We substantially expanded the construction materials operations in the United States with the acquisition of the subsidiaries of the ARC America Corporation. CSR is now one of the largest construction materials companies in the US and is well positioned for further growth in North America." (Attach. 36.)

harmed its citizens. California's interests in asserting jurisdiction in *Asahi* were deemed "slight" partly because the plaintiff was a nonresident. *Asahi*, 480 U.S. at 114. In contrast, plaintiffs in these actions include residents of West Virginia who were exposed to asbestos-containing products produced, manufactured, sold, distributed, or installed by defendants in West Virginia. In *Asahi*, plaintiff's interest was deemed slight also because the litigation concerned a claim for indemnification by a Taiwanese corporation against a Japanese corporation on a commercial transaction that involved a shipment between Japan and Taiwan. Neither litigant had any apparent "interest" in litigating in California, which had no connection with the transaction between the two companies. Obviously, injured West Virginia plaintiffs and plaintiffs from other states who were injured in West Virginia have a substantial interest in obtaining convenient and effective relief in West Virginia, and West Virginia has a significant interest in providing these plaintiffs with a convenient and effective forum in which to obtain that relief.

West Virginia has the most legitimate interest in seeing that all defendants in the proceedings below, including CSR, are held accountable for their violations of West Virginia substantive tort law. Unlike *Asahi*, in which this Court questioned whether California constitutionally could apply its own law to a dispute between Japanese and Taiwanese corporations arising out of a shipment of goods between Japan and Taiwan, 480 U.S. at 115, there is little doubt that West Virginia constitutionally can apply its own tort law to the claims below. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

In addition, most states have substantive social policies similar to West Virginia's aimed at redressing harm from dangerous and defective products. In keeping with the fifth fairness factor articulated by this Court, a shared interest

exists in seeing that alien corporations do not evade jurisdiction of United States courts by marketing products nationally instead of in a particular state.

Finally, although *Asahi* expressed concern about California's assertion of jurisdiction over an alien defendant in the international litigation context presented in that case, CSR reads *Asahi* as granting alien corporations quasi-immunity from jurisdiction in the United States. This Court suggested only that state courts exercise prudence in asserting jurisdiction over alien corporations, and that the reasonableness of jurisdiction over alien defendants will vary from case to case. *See Asahi*, 480 U.S. at 115.

Making the United States a safe haven for the products of alien corporations by limiting state court jurisdiction over them may well result in an unfair advantage to foreign participants in a product's chain of distribution. If a foreign participant in the manufacture and distribution of a product is not subject to jurisdiction in the United States, but an American participant is, the American participant must factor into its cost of doing business the possibility of tort liability, while the foreign participant does not. Thus, the foreign participant has a competitive advantage. American courts should not disadvantage American businesses competing in the global economy by denying jurisdiction over a foreign participant in circumstances when jurisdiction would be upheld over a similarly situated domestic participant.

Hence, analysis of the reasonableness factors demonstrates that the assertion of jurisdiction over CSR in West Virginia comports with this Court's "fair play and substantial justice" standard, and there is nothing in this case that warrants this Court's attention at this time.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Dated: August 2, 1994

Respectfully submitted,

ARTHUR R. MILLER
Counsel of Record
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4111

HOWARD B. STRAVITZ
USC LAW CENTER
Main and Greene Streets
Columbia, South Carolina 29208
(803) 777-6860

RONALD L. MOTLEY
ANN K. RITTER
JAMES M. HUGHES
NESS, MOTLEY, LOADHOLT,
RICHARDSON & POOLE
Suite 600
151 Meeting Street
Post Office Box 1137
Charleston, South Carolina 29402
(803) 577-6747

THEODORE GOLDBERG
TYBE A. BRETT
GOLDBERG, PERSKY,
JENNINGS & WHITE, P.C.
1030 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 471-3980

SCOTT S. SEGAL
SEGAL & DAVIS L.C.
810 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 344-9100

Counsel for Respondents

No. 93-2036

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF WEST VIRGINIA, *ex rel.* CSR LIMITED,
Petitioner,

v.

THE HONORABLE A. ANDREW MACQUEEN, Judge of the Circuit Court of Kanawha County,
CLIFFORD BOSTIC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF THE GOVERNMENT OF AUSTRALIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MARK R. JOELSON
Counsel of Record
JOSEPH P. GRIFFIN
ROGER C. WILSON
MORGAN, LEWIS & BOCKIUS
1800 M Street, NW
Washington, DC 20036
(202) 467-7240
Counsel for the Government of Australia

WILSON - EPES PRINTING CO., INC. - 789 0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, under the Due Process Clause of the Fourteenth Amendment and principles of international law and comity, it was improper for the state courts of West Virginia in a product liability action to assert personal jurisdiction over an Australian company that never sold or attempted to sell the subject material into the state, when a material allegedly produced by the company reached that state, if at all, only through the actions of an independent purchaser of the material, whose finished products, possibly containing material of the Australian company, were sent into the state without any involvement or knowledge of the Australian company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2036

STATE OF WEST VIRGINIA, *ex rel.* CSR LIMITED,
Petitioner,
v.
THE HONORABLE A. ANDREW MACQUEEN, Judge of the Circuit Court of Kanawha County,
CLIFFORD BOSTIC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF THE GOVERNMENT OF AUSTRALIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Having obtained the written consent of the parties pursuant to Rule 37.2 of the Rules of this Court,[1] the Government of Australia submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by CSR Limited ("CSR").

INTEREST OF THE GOVERNMENT OF AUSTRALIA

The Government of Australia has a substantial interest in expressing its views to the Court in this proceeding. The challenged decision of the West Virginia state courts asserting personal jurisdiction over CSR, an Australian company, when it has no connection with the forum, unjustifiably threatens significant harm to that company.

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[1] The consents are filed contemporaneously with this brief.

The "stream of commerce" position adopted by the West Virginia courts also imperils the many other Australian companies that sell raw materials or component parts to U.S. companies. The Commonwealth of Australia is one of the United States's closest allies and a major trading partner. As this Court held in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 115 (1987), decisions concerning the assertion of personal jurisdiction by State courts over foreign parties require, *inter alia*, consideration of the interests of the affected foreign nation.

The facts here, as set out in CSR's petition, establish that CSR lacks any meaningful contact with West Virginia. In the view of the Australian Government, the assertion of personal jurisdiction over CSR by the West Virginia courts is unreasonable and unfair, and thus is in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The jurisdictional doctrine adopted below, by reason of its unbridled reach, has the very real potential of subjecting many Australian companies and citizens to jurisdiction in distant judicial fora and of burdening them with litigation with which they have no real connection.

In addition to these problems of unpredictability and unfairness to Australian persons, such an assertion of jurisdiction raises serious issues of international law and relations which are of concern to the Government of Australia. The subjection of CSR to jurisdiction in West Virginia in this dispute not only violates the fundamental due process guaranteed by the United States Constitution but also contravenes accepted norms of international law and comity among nations to which this Court has traditionally accorded great significance.

In 1978, the U.S. Department of State, at the suggestion of the Clerk of this Court,[2] encouraged foreign gov-

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[2] Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *reprinted in part in* U.S. Dep't of State, 1978 *Digest of United States Practice in International Law* 560, 561, *and in* 73 Am. J. Int'l L. 122, 125 (1979).

ernments to present their views with regard to pending judicial proceedings directly to the U.S. courts.[3] Since then, friendly foreign governments have submitted briefs *amici curiae* to this and other relevant U.S. courts. This *amicus* brief is, accordingly, submitted to inform the Court of the Australian Government's views and to support CSR's request for review.

STATEMENT OF THE CASE

The pertinent jurisdictional facts appear to be undisputed.[4] CSR is an Australian corporation which acted as the sales agent for a subsidiary that mined raw asbestos fibers in Australia. Some of those fibers were sold to Johns Manville Corporation ("Manville"), which caused the asbestos fibers to be delivered to various Manville plants in the United States, none of which was located in West Virginia. Respondents are individual plaintiffs in the proceedings below who claim personal injury from exposure to numerous asbestos products manufactured by a large number of defendants. Respondents claim, *inter alia*, that Manville used CSR fiber to make certain asbestos products and that Manville distributed these products throughout the United States, including in West Virginia. An unspecified number of the plaintiffs in the West Virginia litigation claim they suffered exposure to Manville products containing CSR fiber.

CSR filed with the Circuit Court of Kanawha County, West Virginia a motion to dismiss the consolidated complaints against it for lack of personal jurisdiction. CSR

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[3] Department of State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *reprinted in part in* U.S. Dep't of State, 1978 *Digest of United States Practice in International Law* 560, *and in* 73 Am. J. Int'l L. 122, 124 (1979). *See also* Letter from Deputy Legal Adviser Marks (June 15, 1979), *described in* 73 Am. J. Int'l L. 669, 678-79 (1979).

[4] A more complete statement of facts is provided in the petition for certiorari.

also offered supporting evidence to show its complete lack of contacts with West Virginia. Respondents offered no evidence that any product sold by Manville in West Virginia contained any CSR asbestos fiber. However, Chief Judge MacQueen of the Circuit Court denied CSR's motion. He reasoned that this Court "has clearly adopted the stream of commerce rule" whereby "a manufacturer [who] puts his product in the stream of commerce . . . can be held accountable wherever he is found, that is, that he will not be heard to object that he didn't expect his product to appear in whatever forum or jurisdiction it appeared in." [5]

CSR filed a petition for a writ of prohibition in the West Virginia Supreme Court of Appeals challenging Judge MacQueen's ruling. That court denied the writ of prohibition. Relying on Justice Brennan's concurring opinion in *Asahi*, it held that "personal jurisdiction 'premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause' and can be exercised without the need to show additional conduct by the defendant aimed at the forum state." [6]

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[5] Petition, Appendix B at 14a-15a.

[6] Petition, Appendix A at 2a.

ARGUMENT

INTRODUCTION

The question whether a party's placement of a raw material or component into the stream of commerce, without more, subjects the party to personal jurisdiction in any State into which a product containing the material or part finds its way, is an important one urgently warranting resolution by this Court. The issue is particularly significant and pressing in the international context involved here. International commerce requires fairness and predictability. In Australia and throughout the rest of the world, foreign sellers transfer materials and components to U.S. purchasers with no expectation that they are thereby submitting themselves to personal jurisdiction in whatever U.S. State the ultimate product may be sent to by its manufacturer or by anyone else who comes into possession of the product.[7] Yet, as the Petition points out and the incorrect ruling below underscores, the U.S. law on this issue is in serious conflict by reason of the disagreement between Justice O'Connor's plurality opinion and Justice Brennan's concurrence in *Asahi*.[8]

In the view of the Government of Australia, the court below incorrectly relied on Justice Brennan's concurring opinion in *Asahi*, rather than on the reasoning in Justice O'Connor's plurality opinion that "minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " *Asahi*, 480 U.S. at 109 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). However, even Justice Brennan's formulation requires that the party placing an item in the stream

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[7] Indeed, here Judge MacQueen found that CSR had no idea that West Virginia existed when it was selling raw asbestos fiber to Manville. Petition, Appendix C at 17a.

[8] The conflicting decisions of the federal courts of appeals and state courts of last resort since *Asahi* was decided in 1987 are discussed in the Petition at 10-12.

of commerce be "aware that the final product is being marketed in the forum State", 480 U.S. at 117, a prerequisite that is not met in this case. Moreover, the court below improperly disregarded the "fair play and substantial justice" element of the standard for assertion of personal jurisdiction over foreign defendants, which was expressly applied by all the Justices in *Asahi* except Justice Scalia. *Asahi*, 480 U.S. at 102. The ruling of the West Virginia courts is also contrary to the fundamental principles of international law and comity that require assertions of personal jurisdiction by one nation over another nation's citizens to be reasonable.

I. THE WEST VIRGINIA COURTS' ASSERTION OF PERSONAL JURISDICTION OVER CSR VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. "Purposeful Availment" Requires More Than Merely Placing an Item in the Stream of Commerce Flowing to the United States.

As the Court has enunciated in many of its decisions, including *Asahi*, the Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. 480 U.S. at 108. Justice O'Connor correctly explains in part II-A of the *Asahi* opinion that "purposeful availment" by a non-resident party of the privilege of conducting activities in the forum State is the critical prerequisite for the State's exercise of personal jurisdiction over the defendant party:

> "[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State." [9]

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[9] 480 U.S. at 108-09 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

This restates the principle, recognized by the Court more than thirty years ago, that for a court to exercise personal jurisdiction, there must exist

> some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws[,] [10]

and that the requisite forum contacts must

> result from actions by the defendant *himself* that create a "substantial connection" with the forum State.[11]

Based on these long-recognized principles, Justice O'Connor was correct to state in *Asahi* that

> [t]he "substantial connection" . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*[12]

She was also correct in ruling that

> a defendant's awareness that the stream of commerce may or will sweep the product into the forum State

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[10] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

[11] *Asahi*, 480 U.S. at 109 (emphasis in original) (quoting *Burger King*, 471 U.S. at 475 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957))). *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-298 (1980). The defendant's connections with the forum State must be sufficiently substantial to make it foreseeable that the defendant would be subject to litigation there: "[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

[12] 480 U.S. at 112 (emphasis in original) (citing *Burger King*, 471 U.S. at 475, and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

> does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.[13]

In this case, the record establishes that if CSR placed its product into any stream of commerce, it did so only by selling the product to Manville, and that CSR never took any act to purposely avail itself of the privilege of conducting any activities in West Virginia.

Because of countervailing sentiments in favor of the stream of commerce rationale expressed by several Justices in a concurring opinion in *Asahi*,[14] the sound principles enunciated by Justice O'Connor have lacked the full, authoritative force that they merit. This split of opinions in *Asahi* has engendered a corresponding split among lower federal courts.[15] The resulting ambiguity in the law is detrimental to the recognized need for predictability and certainty in international commerce. Because Justice O'Connor's opinion correctly states the due process requirements for assertion of *in personam* judicial jurisdiction, the Court should take this opportunity to restate and fully endorse that opinion.

B. The Assertion by the West Virginia Courts of Personal Jurisdiction Over CSR Does Not Comport with Fair Play and Substantial Justice.

In Part II-B of the ruling in *Asahi*, Justice O'Connor wrote an opinion of the Court, in which she was joined by seven other Justices, reiterating that "the Due Process Clause forbid[s] a State court to exercise personal jurisdiction over [a non-resident defendant] under circumstances that would offend 'traditional notions of fair play

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[13] *Id.*

[14] The concurring opinion, written by Justice Brennan, was joined by Justices White, Marshall, and Blackmun. 480 U.S. at 116-21.

[15] *Compare, e.g., Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671 (1st Cir. 1992) *with Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415 (5th Cir. 1993).

and substantial justice.'" 480 U.S. at 113. This is a jurisdictional test that this Court has employed for almost fifty years, since *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). If the Court below had applied this test, it would not have been able to assert personal jurisdiction over CSR.

It is noteworthy that, in ruling that the exercise of personal jurisdiction over the defendant in *Asahi* would be unreasonable and unfair, this Court gave particular attention to the fact that the defendant was a foreign company. The Court stated,

> The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.[16]

The Court also stated that this context

> calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the [forum] court.[17]

And further that

> [i]n every [such] case . . . those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[18]

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[16] 480 U.S. at 114.

[17] 480 U.S. at 115 (emphasis in original).

[18] *Id.* (quoting *United States v. First National City Bank,* 379 U.S. 378, 404 (1965)).

The West Virginia courts considering this case completely disregarded these wise admonitions of this Court bearing on the international context, as well as the other factors designed to accord CSR fair play and substantial justice on the issue of personal jurisdiction. Instead, the court below focused on aggressively positioning West Virginia's rule for personal jurisdiction on "the outer edge of the due process envelope," because of the perceived risk that, otherwise, plaintiffs in other States "will ravish whatever insurance fund CSR has available to pay injured plaintiffs at the expense of West Virginia plaintiffs." [19]

It may be noted that the pertinent standard under Australian law for asserting personal jurisdiction over a foreign defendant has nothing akin to a "stream of commerce" test and pays great heed to issues of international law and comity. The Australian Government believes that, in the light of this comity-based restraint under Australian law and the factors that the Australian courts look to in deciding whether grounds for personal jurisdiction are made out, Australian courts would not exercise personal jurisdiction over a U.S. raw materials supplier in the reverse situation of this case.[20]

The policies of the Commonwealth of Australia likewise oppose the imposition of excessive jurisdictional claims over its citizens, both corporate and individual. The Government of Australia respectfully requests that these Australian interests, including those of CSR, be adequately considered in this case.

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[19] Petition, Appendix A at 5a.

[20] On the subject of Australian justice, the United States Court of Appeals for the Fourth Circuit has stated that "there is no indication that Australian trials are any less fair than American ones or that the relief provided by an Australian tribunal is less effective." *Ellicott Machine Corp. v. John Holland Party Ltd.*, 995 F.2d 474, 479 (1993).

II. THE WEST VIRGINIA COURTS' ASSERTION OF PERSONAL JURISDICTION OVER CSR IS CONTRARY TO ACCEPTED NORMS OF INTERNATIONAL LAW AND COMITY.

This Court has made it clear that international law is a part of the law of the United States and is to be applied by United States courts. *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972); *The Paquete Habana*, 175 U.S. 677, 700 (1900). The Court has also stressed in various contexts the need for adherence by the U.S. authorities and courts to the basic standards of international comity. *See, e.g., Asahi*, 480 U.S. at 115 (requiring "court[s] to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction") (emphasis in original); *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 543-44 (1987) ("the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation"); *Doe v. United States*, 487 U.S. 201, 218 n.16 (1988) ("We are not unaware of the international comity questions implicated by the Government's attempts to overcome protections afforded by the laws of another nation").

Under principles of international law and comity, assertions of judicial jurisdiction by nations over foreign citizens must be reasonable. A central element of reasonableness is the requirement that there be a substantial connection between the foreign citizen and the forum that asserts jurisdiction.[21] The applicable principles adopted in U.S. law are set forth in Section 421 of the *Restatement (Third) of the Foreign Relations Law of the*

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[21] *See* Ian Brownlie, *Principles of Public International Law* 298 (4th ed. 1990).

United States (1987)[22] (hereinafter cited as "*Restatement (Third)*"), including the following:

> (1) A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.
>
> (2) In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted:
>
> * * * *
>
> (h) the person, whether natural or juridical, regularly carries on business in the state;
>
> (i) the person . . . had carried on activity in the state, but only in respect of such activity;
>
> (j) the person . . . had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity[.]

This rule of reasonableness is derived both from United States case law and from accepted principles of international law.[23] Since at least the 19th Century, it has been

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[22] The Government of Australia does not accept all portions of the *Restatement (Third)* as precisely reflecting the corresponding rules of international law and comity. The Government feels that section 421's list of instances in which the exercise of jurisdiction is justified may extend to cases in which international standards do not justify such an exercise. However, the Government does believe that section 421 is accurate in identifying the existence of a "reasonableness" requirement under international law, even if in an unduly inclusive manner.

[23] *See Restatement (Third)*, Introductory Note to Pt. IV Ch. 2 (at 304) ("The exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement . . . . [I]ncreasingly, [states] object to the improper exercise of jurisdiction as itself a violation of international

widely accepted that international law imposes substantial limitations on a nation's exercise of judicial jurisdiction over a foreign party.[24] This legal imperative has been spurred by the continual growth of international commerce and its concomitant need for comity, regularity, and predictability.

These principles of international law require, independently of the Fourteenth Amendment, that before a forum state can assert jurisdiction over a foreign defendant, an adequate nexus must exist between the two. Applying the standard of the *Restatement (Third)* in this regard, it is clear that no such nexus exists between CSR and West Virginia.[25] CSR did not carry on business or any other activity in West Virginia, as provided in paragraphs (h)

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principles.") and § 421 Reporters' Notes 1 & 2 (at 309) ("The modern concepts of jurisdiction to adjudicate under international law are similar to those developed under the due process clause of the United States Constitution"). *See also, e.g.*, Note from United States Department of State to Embassy of Greece (June 18, 1973), *reprinted in part in* U.S. Dep't of State, 1973 *Digest of United States Practice in International Law* 197, 198; Note from United States Department of State to Minister of Foreign Affairs of Panama (June 30, 1936), *described and reprinted in part in* G. Hackworth, II *Digest of International Law* 172-73 (1941) (protesting against Panama's exercise of judicial jurisdiction over Canal Zone residents). *See generally* Gary Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1 (1987) nn.86-87, and accompanying text (hereinafter "Born").

[24] *See, e.g., D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174 (1850); Joseph Story, *Commentaries on the Conflict of Laws* § 539 (7th ed. 1872). *See generally* Born.

[25] This case does not raise the question of whether, consistently with international law and comity, a U.S. state or federal court could assert personal jurisdiction over a foreign company by aggregating the company's national (*i.e.* U.S.) contacts. *See Asahi* 480 U.S. at 113, n."*". In the view of the Australian Government, whether a particular U.S. State may claim personal jurisdiction over a foreign business should depend upon the existence of a substantial nexus with that particular State.

or (i) of *Restatement (Third)* § 421(2). It has not been shown that CSR's activities outside of West Virginia had a substantial, direct, and foreseeable effect in that State, as contemplated by paragraph (j) of that section. Indeed, it has not even been shown in the proceedings below that any of the asbestos material used in West Virginia originated from CSR. The West Virginia courts, therefore, could not, under international law and comity, assert personal jurisdiction over CSR.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK R. JOELSON
Counsel of Record
JOSEPH P. GRIFFIN
ROGER C. WILSON
MORGAN, LEWIS & BOCKIUS
1800 M Street, NW
Washington, DC 20036
(202) 467-7240
Counsel for the
Government of Australia

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No. 93-2036 (4)

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IN THE

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OCTOBER TERM, 1993

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Petitioner,

—v.—

THE HONORABLE A. ANDREW MACQUEEN, III, Judge of the Circuit Court of Kanawha County, CLIFFORD BOSTIC, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF FOR THE PETITIONER

CHARLES FRIED
Counsel of Record
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

Paul M. Friedberg
Webster J. Arceneaux, III
Richard L. Gottlieb
LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS
Suite 700–One Valley Square
P.O. Box 1746
Charleston, West Virginia 25326
(304) 345-2000

Jonathan I. Blackman
Howard Zelbo
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for Petitioner CSR Limited

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PETITION FOR A WRIT OF CERTIORARI TO
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REPLY BRIEF FOR THE PETITIONER

Respondents acknowledge the disarray in the lower federal courts and the state courts of last resort caused by the differing approaches of Justice Brennan and Justice O'Connor in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).[1] In opposing CSR's petition, they seek rather to deny that the court below took a dispositive stand on the issue between the two approaches in this Court. But the Supreme Court of Appeals of West Virginia could not have been clearer on this score. It rested its decision squarely on Justice Brennan's proposed rule in *Asahi*:

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[1] The statement required by S. Ct. Rule 29.1 appears at Pet. ii.

> This Court, however, is satisfied that CSR introduced a product into the stream of American commerce that it knew would be used in West Virginia. "Personal jurisdiction 'premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause' and can be exercised without the need to show additional conduct by the defendant aimed at the forum state." *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 117, 107 S. Ct. 1026, 1034, 94 L.Ed.2d 92 (1987); Syllabus Point 2, *Hill by Hill v. Showa Denko, K.K.*, 188 W. Va. 654, 425 S.E.2d 609 (1992).

Pet. App. A at 4a-5a. If there could be any doubt on the matter, the syllabus prepared by the West Virginia Supreme Court of Appeals, which by West Virginia law is a part of its disposition, *see* Pet. at 6 n.4, makes clear that this is what that court considered to be its holding. *See* Pet. App. A at 2a.

The West Virginia Circuit Court also was crystal clear that it was basing its decision directly on the proposition that " 'personal jurisdiction can be exercised without the need to show additional conduct by the defendant named in the forum state.' " Pet. App. B at 15a. The Circuit Court found no facts regarding any such "additional conduct," and if the state Supreme Court adverted to any, given its holding and its syllabus, these must be taken to add nothing but atmosphere. That the concurring judge below would have remanded for further fact-finding, Br. in Opp. at 7, simply underscores that the *majority* considered any facts beyond the introduction of a product in the steam of commerce as unnecessary to its conclusion that there was personal jurisdiction here.

Thus, this case squarely presents the question that divided the Court in *Asahi*, whether mere placement of a product in "the stream of commerce" subjects the seller to personal jurisdiction wherever the product ultimately winds up. It poses this question in a context—the sale of a raw material by an

alien to a United States manufacturer who combines it with other ingredients to make a finished product, which the manufacturer then distributes in this country through its own marketing channels—that squarely implicates the "fair play and substantial justice" requirement of personal jurisdiction analysis. The West Virginia Supreme Court of Appeals decided the stream of commerce question as a matter of law, treating the particular facts of any contacts of petitioner CSR with West Virginia as essentially irrelevant, and ruled that the "fair play and substantial justice" requirement is satisfied whenever a large enough number of local plaintiffs sue a foreign defendant that is also being sued in other states.

Respondents seek to avoid coming to grips with the sweeping nature of the West Virginia court's decision by characterizing it as at once "preliminary" and fact-specific. A fair reading of the lower court's opinion shows that it is neither.

1. Contrary to respondent's contention, the West Virginia Supreme Court's decision on jurisdiction is as final as the jurisdictional decisions that gave rise to this Court's opinions in *Asahi*, *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In *Asahi*, petitioner's motion to quash the service of summons and complaint had been denied by the trial court, and a writ of mandate to the trial court that the service be quashed was granted by the California intermediate appellate court and reversed by the Supreme Court of California. 480 U.S. at 105-08. In *World-Wide Volkswagen*, the case came to this Court on denial of a writ of prohibition to restrain the Oklahoma trial court from exercising jurisdiction over the petitioner. 444 U.S. at 288-90. Thus, the two leading recent cases on the subject of personal jurisdiction came to this Court in precisely the same posture as the instant case. In both the previous cases, as in the instant case, the denial of the relief petitioners sought would have subjected them to trial under circumstances where they denied the state court possessed personal jurisdiction to do so. Nor is there any

reason to believe that in those cases petitioners might not have renewed the claim of lack of personal jurisdiction on the basis of different facts or circumstances despite the initial denial of their jurisdictional objections, just as any litigant can seek to reargue an issue on this basis. *See, e.g.*, Cal. Civ. Proc. Code § 1008 (West Supp. 1994) (subsequent motion can be made on "new or different facts, circumstances, or law").[2] Yet this possibility did not defeat their right to seek relief in this Court, and it should not do so now.

In any event, this theoretical possibility is of no more practical significance in this case than it was in *Asahi* and *World-Wide Volkswagen*. Given the "outer envelope" holding of the court below, that court's determination of personal jurisdiction over CSR is definitive, no matter what facts are developed in the course of a trial. This was the same situation in *Asahi* and *World-Wide Volkswagen*, where the state supreme court's rule of law as to personal jurisdiction was so sweeping as to leave no further factual issues to be resolved in the state courts.

Respondents are also wrong in suggesting that the decision of the West Virginia court was made after anything other than a full blown evidentiary hearing on the jurisdictional issue, or that it rests on some kind of tentative "*prima facie*" standard.

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[2] Respondents' suggestion that the state court decisions in *Asahi* and *World-Wide Volkswagen* were somehow more "final" than the state court decision in the instant case because they involved "special appearances," in which "the federal issue *apparently* is finally resolved by the proceedings on the special appearance," Br. in Opp. at 8, n.8, (emphasis supplied) is meritless. Respondents cite no authority for this proposition of California and Oklahoma law, we are aware of none, and the petitions for certiorari and briefs on the merits in *Asahi* and *World-Wide Volkswagen* contain no such statement. Likewise meritless is the attempt to distinguish *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *Rush v. Savchuk*, 444 U.S. 320 (1980), as involving objections to *quasi-in-rem* jurisdiction rather than *in personam* jurisdiction, *id.*, since the exercise of both types of state court jurisdiction is governed by the same constitutional standard. *Shaffer*, 433 U.S. at 212.

Br. in Opp. at 5-7. The hearing on CSR's motion was held after the motion had been previously adjourned by the trial court to permit the respondents to conduct discovery so that the court could adjudicate it finally.[3] Both sides offered affidavits and documentary evidence and presented their legal arguments.[4] The fact that there was no live testimony did not make it any the less a full hearing on the jurisdictional issue, any more than a bench trial conducted solely on the basis of written submissions is any less a trial on the issues presented. There is not the slightest suggestion in the opinions of the trial court or the West Virginia Supreme Court that they reviewed the parties' evidentiary showings on the basis of a *prima facie* standard—a "standard" that appears nowhere in either opinion—so as to render the state supreme court's ruling less than final on the constitutional question raised.

2. Respondents' effort to ground the West Virginia court's jurisdictional decision on findings of disputed fact that it never made, Br. in Opp. 9-12, is radically at odds with the rationale and content of the opinions below. The trial court made no findings beyond the undisputed fact that CSR put a product into the stream of commerce by its sales of fiber to Manville. Pet. App. B at 14a-15a; Pet App. C at 17a. The state supreme court likewise rested its conclusion solely on the placement of fiber by CSR into the stream of commerce by sales to Manville routed to plants outside West Virginia. Pet. App. A at 4a-5a. The essence of the West Virginia court's "outer edge of the due process envelope" theory of jurisdiction, *id.* at 2a, was to avoid any consideration of specific affil-

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[3] CSR's motion to dismiss was first heard by the trial court on May 11, 1993. After ordering discovery, the trial court scheduled a further hearing on November 15, 1993 to hear the parties' evidence and decide the jurisdiction issue. Trial on the merits was scheduled to begin on January 10, 1994.

[4] The affidavits proffered by respondents did not contain any suggestion they were exposed to asbestos sold by CSR, contrary to respondents' statements in their Brief in Opposition here.

iating facts showing forum-oriented conduct by CSR, and rest the exercise of jurisdiction on *a priori* notions of foreseeability stemming from CSR's sale of "substantial quantities" of a product to a major United States manufacturer. *Id.* at 4a.[5] This is the constitutional ruling that merits this Court's review, and as respondents obliquely admit, it is one that deserves a definitive resolution more than seven years after *Asahi* first "splintered" the Court, Br. in Opp. at 10, and continues to divide the lower courts throughout the Nation.

Finally, respondents' lengthy argument that CSR's alleged West Virginia contacts would satisfy any of the three approaches to jurisdiction canvassed in *Asahi* is more appropriate for a brief on the merits than an opposition to certiorari. If there is any doubt on the part of the Court as to the facts regarding these contacts, the remedy would be the traditional one of a remand for further proceedings after the correct jurisdictional standard was announced.

3. Respondents' answer to the "fair play and substantial justice" issue is again to present a justification on the facts for the West Virginia court's decision that the West Virginia court saw no need even to address, and on which it certainly made no findings of any kind. On the contrary, the court below could not have been more explicit, that no facts beyond CSR's placement of its goods in the stream of commerce were

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[5] The West Virginia courts may have recognized that the "evidentiary" basis for most of the purported facts referred to by respondents in their opposition to CSR's petition was questionable at best, if not nonexistent. Most of the "Attachments" referred to by respondents in their Brief in Opposition—which do not appear to have been filed with this Court—were submitted to the trial court without authentication, foundation or explanation, and virtually none of them would be admissible in evidence in the form in which they were proffered. For example, the assertion that "Manville entered into a contract with CSR under which Manville for a time became CSR's exclusive agent for the sale of Australian blue asbestos fiber in the United States," Br. in Opp. at 2, which is absolutely untrue, is based on an excerpt from an undated magazine article by an unknown author.

necessary to its conclusion that West Virginia could exercise personal jurisdiction as a matter of due process. *See supra* pp. 1-2.

It is therefore hardly surprising that there is no indication in the lower court's opinion that the registration to do business in West Virginia of an indirect CSR subsidiary (one that had nothing to do with asbestos) more than two decades after CSR stopped selling asbestos to Manville, Br. in Opp. at 14, played any part in the West Virginia court's treatment of this aspect of the *Asahi* Court's analysis. Indeed, neither court below made any mention of this fact. There was no issue raised below (nor could there have been) of general jurisdiction over CSR in West Virginia on account of any activity of this subsidiary—unrelated as it would be to any aspect of respondents' claims—under the standard of *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). Whether the existence of this corporation or any other unrelated business of CSR in the United States outside West Virginia should bear on the "fair play and substantial justice" of West Virginia's asserting specific jurisdiction over CSR for the events of thirty years ago would involve the merits of the jurisdictional issue (although it played no part in the West Virginia court's resolution of that issue). It has no bearing on the appropriateness of this Court's granting review.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES FRIED
Counsel of Record
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

Paul M. Friedberg
Webster J. Arceneaux, III
Richard L. Gottlieb
LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS
Suite 700–One Valley Square
P.O. Box 1746
Charleston, West Virginia 25326
(304) 345-2000

Jonathan I. Blackman
Howard Zelbo
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for Petitioner
CSR Limited